No. _____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

EXXON CORPORATION, THE BF GOODRICH COMPANY, UNION CARBIDE CORPORATION, AND MONSANTO COMPANY,
Petitioners,

v.

SUSAN B. BOYLE, ADMINISTRATOR OF THE NEW JERSEY SPILL COMPENSATION FUND, *et al.*,
Respondents.

Petition For A Writ Of Certiorari To The Appellate Division Of The New Jersey Superior Court

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

In *Exxon Corp. v. Hunt,* 475 U.S. 355, 376 (1986), this Court held that a New Jersey tax was expressly preempted by a Federal statute and remanded the case for a determination "whether, or to what extent, the non-preempted provisions of the statute are severable from the preempted provisions." The New Jersey courts nonetheless denied petitioners any refund by construing this Court's decision in *Hunt* as declaring that Federal law preempted expenditures, rather than taxes, and by exercising equitable discretion to avoid a refund, which they labelled a "remedy of last resort."

The question thus presented is whether the New Jersey courts have violated this Court's mandate in *Hunt* by holding that expenditures, rather than taxes, were preempted and by ignoring this Court's ruling in *McKesson Corp. v. Division of Alcoholic Beverages and Tobacco*, 496 U.S. 18, 39-40 (1990), that equitable discretion cannot be invoked to deny taxpayers a refund where, as here, a tax "was beyond the State's power to impose?"

PARTIES TO THE PROCEEDING

The petitioners are named in the caption.*/

The respondents are Susan B. Boyle, successor in office to Robert Hunt as Administrator of the New Jersey Spill Compensation Fund; Samuel F. Crane, successor in office to Clifford A. Goldman as Treasurer of the State of New Jersey; Leslie A. Thompson, successor in office to Sidney Glaser as Director of the Division of Taxation; Jeanne M. Fox, successor in office to Jerry F. English as Commissioner of Environmental Protection; and the State of New Jersey.

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*/ Pursuant to Rule 29.1, all parent companies and subsidiaries (except wholly owned subsidiaries) of petitioners are listed in the Appendix at pages 74a-88a.

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SUSAN B. BOYLE, ADMINISTRATOR OF THE NEW JERSEY SPILL COMPENSATION FUND, *et al.*,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE APPELLATE DIVISION OF THE NEW JERSEY SUPERIOR COURT

Petitioners seek a writ of certiorari to review and summarily reverse the decision of the Appellate Division of the Superior Court of New Jersey in *Exxon Corp.* v. *Hunt*, 620 A.2d 1068 (N.J. Super. A.D. 1993), *certification denied*, No. C-920 (N.J. May 27, 1993).

OPINIONS BELOW

The December 2, 1987 opinion of the Supreme Court of New Jersey (App., 15a-38a) on remand from this Court is reported at 534 A.2d 1 (N.J. 1987). The October 24, 1986 Recommendation of the Tax Court of New Jersey to the New Jersey Supreme Court (App., 39a-69a) is not reported.

The February 22, 1993 opinion of the Appellate Division of the New Jersey Superior Court (App., 2a-7a) is reported at 620 A.2d 1068 (N.J. Super. A.D. 1993), *certification denied*, No. C-920 (N.J. May 27, 1993) (App., 1a). The June 28, 1991 Memorandum Opinion of the Tax Court of New Jersey (App., 10a-14a) is not reported.

JURISDICTION

On December 2, 1987, the New Jersey Supreme Court, acting on the mandate from this Court in *Exxon* v. *Hunt*, 475 U.S. 355 (1986), remanded this case to the New Jersey Tax Court. On February 2, 1993, the Appellate Division of the New Jersey Superior Court rendered its decision reviewing the New Jersey Tax Court's June 28, 1991 decision. The New Jersey Supreme Court denied discretionary certification and thereby declined to review the Appellate Division's decision in an order that was filed on May 27, 1993. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a) (1988).

STATUTORY PROVISION INVOLVED

Section 114(c) of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA), 42 U.S.C. § 9614(c) (1985), provided:

> Except as provided in this chapter, no person may be required to contribute to any fund, the purpose of which is to pay

> compensation for claims for any costs of response or damages or claims which may be compensated under this subchapter. Nothing in this Section shall preclude any State from using general revenues for such a fund, or from imposing a tax or fee upon any person or upon any substance in order to finance the purchase or prepositioning of hazardous substance response equipment or other preparations for the response to a release of hazardous substances which affects such State.[1/]

STATEMENT

This suit began in 1981 when petitioners filed an action in the New Jersey Tax Court seeking a refund of taxes imposed under the 1977 New Jersey Spill Compensation and Control Act (Spill Act), N.J. Stat. §§ 58:10-23.11, *et seq.* Like many states, New Jersey provides no pre-deprivation hearing with regard to a disputed tax. Taxpayers must instead pay the tax and then seek a refund from the New Jersey Tax Court. N.J.S. 54:49-14.[2/]

Petitioners complained that the taxes which created a fund under the Spill Act were pre-empted by Section 114(c) of

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[1/] On October 17, 1986, Section 114(c) was revised by the Superfund Amendments and Reauthorization Act of 1986 (SARA), Pub. L. 99-499 § 114, 100 Stat. 1652 (1986). SARA did not contain a tax pre-emption provision.

[2/] Petitioners' efforts to obtain a refund in the New Jersey courts for taxes unlawfully imposed under the Spill Act were preceded by their unsuccessful effort to obtain an injunction in federal court that would have provided them with at least a partial pre-deprivation remedy. *See Exxon Corp.* v. *Hunt*, 683 F.2d 69 (3d Cir. 1982), *cert. denied*, 459 U.S. 1104 (1983) (holding that petitioners' federal court action was barred by the Tax Injunction Act, 28 U.S.C. § 1341).

CERCLA, 42 U.S.C. § 9614(c), because the principal purpose of the fund, which pre-dated CERCLA by three years, was to pay costs, damages or claims that had become eligible for compensation under CERCLA. The Tax Court ruled against petitioners, holding that CERCLA did not pre-empt the exaction of a state tax used to create funds whose purpose was to pay costs, damages or claims eligible for CERCLA compensation, but instead merely prevented the expenditure of the monies raised by such taxes for paying cleanup expenses that were later actually paid by the "Superfund" established by CERCLA. Its decision was affirmed both by the Appellate Division of the Superior Court and the Supreme Court of New Jersey.[3/]

This Court overturned the New Jersey courts' construction of CERCLA. *Exxon Corp. v. Hunt*, 475 U.S. 355 (1986). Recognizing that "[t]his is an express pre-emption case," this Court agreed with petitioners that "the New Jersey courts have violated the plain meaning of the statute." *Id.* at 362, 370. After determining that New Jersey had imposed a tax to create a fund whose purpose was to pay for two types of claims eligible for compensation under CERCLA,[4/] the Court ruled that New Jersey's exaction of the Spill Fund tax was pre-empted to the extent that its purpose was to pay for these expenses. *Id.* at 376. The Court specifically rejected New Jersey's argument that its tax was lawful because the expenditures actually made from the Spill Fund were not pre-empted:

> New Jersey argues, finally, that after the enactment of CERCLA, . . . all Spill Fund

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[3/] 97 N.J. 526, 481 A.2d 271; 190 N.J. Super. 131; 4 N.J. Tax 294.

[4/] The Court held that Spill Fund claims for governmental cleanup of hazardous waste sites and reimbursement of third parties for cleanup costs "are within the scope of CERCLA, except to the extent that they are intended to provide the 10% state share of remedial costs." 475 U.S. at 375-76.

> expenditures for [CERCLA purposes] have been for non-Superfund eligible sites, and therefore are for non-pre-empted purposes. *To the extent that the Spill Act permits taxation to support pre-empted expenditures, however, it cannot stand.*

Id. (emphasis added).[5/]

Thus making it clear that the appropriate inquiry was whether the imposition of the Spill Act tax was for an improper purpose, not how New Jersey later expended moneys from the Spill Fund, this Court held that the New Jersey tax was pre-empted. It remanded for a determination whether any portion of the tax could be saved: the New Jersey courts were directed to consider "whether, or to what extent, the non-pre-empted provisions of the statute are severable from the pre-empted provisions." 475 U.S. at 376.

The New Jersey Supreme Court sent the matter back to the Tax Court to develop a record and to make recommended findings. App., 70a. That court determined, in direct response to this Court's mandate, that the tax itself could not be severed and that a refund of the entire Spill Fund tax would be appropriate if this Court had declared that the collection of the tax was pre-empted. App., 57a, 65a. However, the Tax Court embraced the very premise which this Court had rejected — that "it was not the collection of the Spill Act tax that the [United States Supreme] Court found

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[5/] The premise of the state's argument was also factually erroneous. At the time of this Court's decision, only a *de minimis* proportion of Spill Fund expenditures had been devoted to costs, damages or claims that were not eligible for compensation under CERCLA. *See* Appellants' opening brief in *Exxon Corp. v. Hunt*, No. 84-978, at 22-23 n.24, 25 n.26. This pattern continued following this Court's decision -- the record before the Tax Court on remand showed that 89% of the $49.5 million spent by New Jersey on cleanup was devoted to sites eligible for Superfund compensation. *See* Appendix in Support of Plaintiffs' Motion for Summary Judgment, Schedule IV.

to be improper but rather certain expenditures made from the Fund." App., 50a.[6/] The Tax Court accordingly ruled that petitioners would be entitled to a refund, only if the State had expended monies from the Spill Fund on sites eligible for compensation under CERCLA.[7/]

Also reflecting its view that expenditures, rather than taxes, were pre-empted, the Tax Court held that "the [State] Legislature should be permitted a reasonable period of time to reimburse the Spill Fund for the amount of pre-empted expenditures made." App., 66a. Such reimbursement, the Tax Court concluded, "will make plaintiffs whole because the constitutional infirmity and plaintiffs' financial harm resulted from the improper *expenditure* of Spill Fund revenues and not the *collection* of the tax per se." *Id.* (emphasis in original).

[6/] In embracing this false premise — the linchpin of its holding — the Tax Court attributed language to this Court that is nowhere to be found in *Hunt* and is wholly inconsistent with the Court's analysis:

> The United States Supreme Court . . . held that, "the State was entitled to *collect taxes*," . . . but that, "the State was not permitted to *spend* that money for any of the types of projects which EPA intended to finance," with superfund. Quite simply put, it was the nature of certain expenditures and not the tax collected to fund *all* the expenditures . . . that the Court found to be objectionable.

App., 59a (emphasis and quotation marks in original). *See also* App., 67a ("the harm which plaintiffs . . . allegedly suffered is the improper expenditure of legal tax monies").

[7/] Consistent with this approach, the Tax Court also held that state expenditures were pre-empted, only if made after the June 16, 1982, promulgation of the National Contingency Plan (NCP) or, where applicable, the September 8, 1983, promulgation of the National Priority List (NPL) identifying sites in New Jersey and elsewhere qualifying for CERCLA reimbursement of clean-up costs. App., 68a. The Tax Court adopted its own date for pre-emption even though it acknowledged in its opinion: "Congress, in § 152 of CERCLA expressly stated that § 114(c) would become effective on passage, (in contrast with the predecessor version in H.R. 85 which had a 180 day delay in its preemption provision)." App., 49a.

The New Jersey Supreme Court adopted these recommendations of the Tax Court. App., 38a. It too held that Section 114(c) of CERCLA pre-empted only expenditures from the Spill Fund, not the collection of the tax. App., 21a-26a, 33a, 37a-38a. The state Supreme Court thus concluded that the provisions of the Spill Act allowing "pre-empted" expenditures could be severed from those that allowed other expenditures. App., 21a-26a.[8/]

Invoking its purported equitable discretion, the state Supreme Court said that it would treat a tax refund as a "remedy of last resort." App., 37a. On the assumption that this Court in *Hunt* held that Section 114(c) pre-empted expenditures from the Spill Fund, rather than taxes exacted for an improper purpose, the court held that petitioners would receive no refund if the Legislature "reimburse[s] the Spill Fund for the amount of expenditures found to be pre-empted." App., 38a. In reaching this result, the court relied on neither an analysis of CERCLA nor this Court's opinion in *Hunt*. Instead, it stated that it was "obliged to consider" the repeal of Section 114(c), effective October 17, 1986, in the Superfund Amendments and Reauthorization Act of 1986 (SARA), App., 33a, and it crafted a remedy which it asserted "best implements the intent of Congress" when it repealed pre-emption under CERCLA, App., 37a.[9/] The New Jersey

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[8/] The court also held, like the Tax Court, that pre-emption did not begin on the effective date of Section 114(c), but instead on the dates related to publication of the NCP and NPL. App., 28a-29a. It thereby declined to accord any pre-emptive effect to Section 114(c) for approximately three out of the five years that the provision was in effect. App., 31a.

[9/] The Court also relied on an affidavit of the Deputy Commissioner of the DEP that the expected needs of the Spill Fund for non-pre-empted purposes are substantially higher than anticipated revenue. App., 25a. Despite this prediction, the coffers in the Fund had swollen to more than $84 million as of June 30, 1991. State of New Jersey, Department of Environmental Protection and Energy, Spill Compensation Fund, Annual Report for Fiscal Years 1990 and 1991.

Supreme Court again remanded the case to the Tax Court for a hearing on the amount of "pre-empted" expenditures made from the Spill Fund so that the Legislature could have the opportunity to reimburse the fund.

In February 1988, petitioners filed for a writ of mandamus in this Court, *In re Exxon Corp., et al.*, No. 87-1296, contending that the New Jersey courts had misread this Court's mandate in *Hunt* by focusing on improper expenditures from the Spill Fund, rather than the imposition of a pre-empted tax. The State opposed the petition. Its primary argument was that the review sought was "interlocutory in nature and thus inconsistent with the final judgment rule" because the New Jersey Tax Court had not quantified the "pre-empted expenditures" and the New Jersey legislature had not yet determined whether to reimburse the Spill Fund. Brief in Opposition, *In re Exxon Corp., et al.*, No. 87-1296, at 11-14. On March 28, 1988, this Court denied the mandamus petition. 485 U.S. 975.

The case returned to the New Jersey Tax Court, where the parties agreed that $8,147,094.07 million had been expended for pre-empted purposes after the 1982/1983 promulgation of the NCP and NPL. The path was thus cleared for the New Jersey Legislature to "reimburse" the fund for this amount and destroy petitioners' rights to a refund. On December 16, 1992, during the pendency of petitioners' appeal to the Appellate Division of the New Jersey Superior Court, the Attorney General of New Jersey informed petitioners that the New Jersey Legislature had taken such action by "transfer[ring] $8,142,094 . . . into the [Spill Fund], in satisfaction of the obligations imposed by the remedy devised by the New Jersey Supreme Court's decision in *Exxon Corp.* v. *Hunt*, 109 N.J. 110 (1987)." App., 8a.

On February 22, 1993, the Appellate Division affirmed the Tax Court's judgment and denied petitioners' claims for a refund. In doing so, the Appellate Division rejected

petitioners' arguments based on *McKesson* v. *Division of Alcoholic Beverages & Tobacco*, 496 U.S. 18 (1990). The court read *McKesson* as holding that "if a workable means for curing the pre-emption impairment of the Spill Fund Tax short of a refund is employed, then the plaintiffs' constitutional right to an effective remedy will not have been violated." App., 5a. The court concluded that petitioners "can have no enforceable claim to a refund of any portion of the funds as long as all Spill Fund revenues expended for pre-empted purposes during the period of pre-emption are returned to the Fund from general revenues within a reasonable period of time." App., 6a-7a.

On May 27, 1993, the New Jersey Supreme Court issued an order declining to review the Appellate Division's decision. App., 1a.

REASONS FOR GRANTING THE PETITION

This petition involves the culmination of a 13-year pattern of recalcitrance on the part of the State of New Jersey concerning the pre-emptive effect of Section 114(c) of CERCLA. When that statute was enacted in 1980, New Jersey declared that it would ignore Section 114(c) and persist in collecting the tax until "a final determination by the courts is to the contrary."[10/] New Jersey was the *only* state that continued to collect a tax of this nature after the effective date of Section 114(c).[11/] When the issue reached the New Jersey courts, they originally held that Section 114(c) did not pre-empt the Spill Act tax, but instead pre-empted only certain categories of expenditures from the Spill Fund. This Court reversed that judgment, stating that "the New Jersey

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[10/] [1 N.J.] St. Tax Rep. (CCH) ¶ 34-180.75 (1981).

[11/] *See* Appellants' reply brief in *Exxon Corp.* v. *Hunt*, No., 84-978, at 18-19.

courts have violated the plain meaning of the statute." 475 U.S. at 362, 370.

On remand, the New Jersey courts, at the urging of the State Attorney General, have refused to heed the mandate in *Hunt* and have denied petitioners any refund of the pre-empted tax through reliance on the premise, expressly rejected in *Hunt*, that CERCLA pre-empted expenditures from the fund rather than the exaction of taxes. In addition, the New Jersey courts have ignored this Court's ruling in *McKesson Corp.* v. *Division of Alcoholic Beverages and Tobacco*, 496 U.S. 18 (1990), which *precludes* the New Jersey courts' exercise of equitable discretion in circumstances, like these, involving a pre-empted tax. This petition should be granted to ensure the integrity of the mandate in *Hunt* and respect for this Court's decisions.[12/]

1. Section 114(c) of CERCLA provided that "*no person may be required to contribute* to any fund, the purpose of which is to pay compensation for claims for any costs of response or damages or claims which may be compensated under this subchapter." The Spill Fund clearly had such a

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[12/] Mandamus is a traditional remedy where the lower court's decision on remand is "based upon a misunderstanding of the mandate, and in practical, though unintentional, disobedience of the command thereof that further proceedings be had in conformity with the opinion of this court." *In re Potts*, 166 U.S. 263, 268 (1897). *See also Vendo Co. v. Lektro-Vend Corp.*, 434 U.S. 425, 428 (1978) (per curiam); *General Atomic Co. v. Felter*, 436 U.S. 493 (1978) (per curiam); *Will v. United States*, 389 U.S. 90, 95-96 (1967); *United States v. Haley*, 371 U.S. 18 (1962).

In recent years, however, this Court has reviewed failures to comply with the Court's mandate via the writ of certiorari. *See, e.g., Yates v. Aiken*, 484 U.S. 211, 214 (1988) ("We granted certiorari because we were concerned that the South Carolina Supreme Court had not fully complied with our mandate."); *Sumner v. Mata*, 455 U.S. 591 (1982) (granting petition for writ of certiorari to review failure to comply with Supreme Court's remand instructions). Because petitioners can obtain adequate relief from a writ of certiorari, they have not filed a petition for a writ of mandamus. *See* Sup. Ct. R. 20.1 (writ of mandamus available only if "adequate relief cannot be obtained in any other form . . .").

purpose during all of the years that Section 114(c) was in effect. As the New Jersey Supreme Court acknowledged on remand: "The purpose of the Spill Act, enacted in 1977, was to finance prevention and cleanup of oil spills and hazardous substance discharges . . . ." App., 18a. The lower court conceded that the State "levied an excise tax on major chemical and petroleum facilities within the state . . . to implement the legislative goals." *Id.*

In *Hunt* this Court interpreted Section 114(c), in accord with its plain meaning, as pre-empting a tax with such purposes:

> To the extent [the New Jersey Supreme Court] held that the Spill Act could constitutionally *impose a tax* to support expenditures for purposes that we have identified as pre-empted, its judgment is reversed . . . .

475 U.S. at 376 (emphasis added). The Court's remand instructions were as follows:

> We leave to the New Jersey Supreme Court the state-law question whether, or to what extent, the non-pre-empted provisions of the statute are severable from the pre-empted provisions. See *Exxon Corp.* v. *Eagerton*, 462 U.S. 176, 196-97 (1983).

Id.[13/]

[13/] The Court also made clear that it did not expect the New Jersey courts on remand to sustain the entire tax:

> We decline the dissent's invitation to hold that the Spill Act is valid in its entirety because a substantial portion of its purposes are permissible. Such a

(continued...)

The issue before the New Jersey courts on remand was therefore clear-cut: Could the pre-empted purposes of the tax be severed from its non-pre-empted purposes? If not, petitioners would be entitled to a refund of all taxes paid.

Petitioners argued on remand that there could be no such severance because the legislature had imposed a single, non-severable tax that supported both pre-empted and non-pre-empted purposes. *The New Jersey Tax Court agreed*:

> To the extent that the Spill Act contains a single tax that cannot be apportioned between its pre-empted and non-pre-empted purposes, [petitioners] are correct.
>
> * * *
>
> [H]ad the [United States Supreme Court in *Hunt*] found that it was the *collection* of the tax that was improper, this Court should direct repayment of the taxes to the taxpayers in the same proportion as the taxes were paid.

App., 57a, 65a (emphasis in original). *See also*, App. 59a ("[T]he tax cannot be apportioned . . . ."). The State Supreme Court did not disturb this analysis. App., 21a, 38a.[14/] Accordingly, under this Court's mandate, the lower

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[13/](...continued)
holding would be an open invitation to the States to flout federal law by including valid provisions within clearly invalid statutes.

475 U.S. at 375.

[14/] The State Supreme Court, like the Tax Court, acknowledged petitioners' argument that the New Jersey Constitution prohibited the New Jersey courts from recomputing a new, lower tax rate for the Spill Fund (continued...)

courts should have ordered a refund to taxpayers of all of the taxes they had paid during the years that Section 114(c) was in effect.

However, the New Jersey courts avoided this conclusion by embracing the very premise that this Court had rejected in *Hunt*, namely, that "it was not the collection of the Spill Act tax that the [United States Supreme] Court found to be improper, but rather certain expenditures made from the fund." App., 50a; *see also* App., 33a, 38a.[15/] From this premise the New Jersey courts concluded that the pre-emption proscribed in *Hunt* could be remedied by inviting the legislature to replenish improper expenditures from the fund, instead of refunding unlawfully exacted taxes to petitioners.[16/]

The New Jersey courts' crucial premise on remand — that *Hunt* held that Section 114(c) pre-empted only *expenditures* from the fund for an impermissible purpose and not the *imposition* of the tax for an impermissible purpose — is flatly contrary to the plain language of both Section 114(c) and to this Court's decision in *Hunt*. Section 114(c) prohibits a state from requiring a person "*to contribute* to any fund"

[14/](...continued)
sufficient for the fund's non-pre-empted purposes. *See* App., 22a, 57a.

[15/] This erroneous premise also infected the New Jersey Appellate Division's subsequent opinion, *see, e.g.*, App., 5a-7a ("The tax itself has not been held invalid for any reason. . . . [T]he plaintiffs can have no enforceable claim to a refund of any portion of the funds as long as all Spill Fund revenues expended for pre-empted purposes during the period of pre-emption are returned to the Fund . . . .")

[16/] The same mistaken premise also led the New Jersey courts into error about the dates of pre-emption under Section 114(c): As the New Jersey Supreme Court declared, "the NCP and the NPL marked the critical dates on which preemption of remedial or removal *expenditures*, respectively, shall be deemed to have commenced." App., 28a (emphasis added). See also, App., 50a, where the New Jersey Tax Court recited the same rationale to justify postponement of the effective date of pre-emption.

that has certain purposes — *i.e.* taxation to support a fund designed by the legislature to serve purposes addressed by CERCLA. The subsequent expenditure of moneys from a fund by administrators does not affect the tax's pre-empted purpose.

Hunt not only embraced this analysis, but it also expressly rejected the very line of reasoning adopted by the New Jersey courts on remand.[17] New Jersey argued before this Court that no refund was required because "all Spill Fund expenditures" have been "for non-pre-empted purposes." 475 U.S. at 376. This Court disagreed: "To the extent that the Spill Act permits *taxation to support* pre-empted expenditures, however, it cannot stand." *Id.* (emphasis added.) Further emphasizing that Section 114(c) pre-empted the imposition of taxes for certain kinds of funds, rather than the expenditure of moneys from such funds, this Court stated that

> [Section 114(c)] is meant to forbid the States *to impose taxes* to finance certain types of funds. The issue in this case is whether the New Jersey Spill Fund is, in whole or in part, the type of fund that § 114(c) pre-empts.

Id. at 361 (emphasis added); *see also, e.g., id.* at 362 (question is whether Section 114(c) "forbids state taxation of the type the Spill Act imposes"). Finally, the Court's statement of its holding makes clear that Section 114(c) pre-empts taxation for an improper purpose rather than

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[17] The State of New Jersey has acknowledged this point. In its brief in opposition before this Court in 1988, the State "agree[d] with petitioners that this Court [in *Hunt*] held that the actual expenditures made by the Spill Fund were irrelevant for the purpose of statutory construction -- that is, deciding what § 114(c) meant . . . ," but argued that "it does not follow from this conclusion that expenditures are irrelevant for the purpose of remedy." Brief in Opposition, *In re Exxon Corp., et al.*, No 87-1296, at 19.

expenditure for an improper purpose: "To the extent [the New Jersey Supreme Court] held that the Spill Act could constitutionally *impose a tax* to support expenditures for purposes that we have identified as pre-empted, its judgment is reversed." *Id.* at 376 (emphasis added).

The matter could not be clearer: Even if no expenditures had been made from the fund for expenditures subsequently within the scope of CERCLA, a tax designed to raise money to support such expenditures was nonetheless pre-empted. Obviously, the lower courts' inquiry into whether the Spill Fund made "pre-empted expenditures" has nothing to do with whether petitioners paid a pre-empted tax. In the context of New Jersey's pattern of obstinate refusal to submit to the plain language of Section 114(c), New Jersey should be ordered in accordance with the mandate of *Hunt* to refund all Spill Fund taxes paid by petitioners.

2. The New Jersey Supreme Court's refusal to refund the Spill Act tax assessed against petitioners cannot be justified by the exercise of its purported "equitable powers." App., 37a.[18/] The only question open on remand was the issue of severability, *i.e.*, whether petitioners were entitled to a total refund or whether some portion of the tax imposed on them could be severed and saved. 475 U.S. at 376-77. The lower court's decision to invoke its equitable discretion to "make the Spill Fund whole" and to treat a tax refund to petitioners as a "remedy of last resort" thus went beyond the mandate in *Hunt*. *See Sibbald* v. *United States*, 37 U.S. (12 Pet.) 488, 492 (1838) (the court below "is bound by the decree [of this Court] . . . [and cannot] give any other or further relief; . . . nor intermeddle with it, further than to

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[18/] This case does not raise an issue regarding the application of Section 114(c) to taxes paid prior to this Court's decision in *Hunt*, because the New Jersey Supreme Court agreed with petitioners that *Hunt* must be given full retroactive effect. App., 27a. *Compare Harper* v. *Virginia Dept. of Taxation*, 113 S. Ct. 2510, 125 L. Ed 2d 74 (1993).

settle so much as has been remanded"); *see also Briggs v. Pennsylvania R. Co.*, 334 U.S. 304, 306 (1948).

The court below grounded its "equitable" remedy denying petitioners a refund on a factor — the subsequent repeal of Section 114(c) — that *Hunt* expressly declared to be irrelevant to petitioners' right to a refund. It relied heavily on the legislative history underlying Congress' 1986 decision not to continue to include a tax pre-emption provision in CERCLA. *See* App., 33a-37a. The court stated that it felt "obliged to consider the context in which repeal of the limited pre-emption of the Spill Act occurred," App., 33a, and "constrained to fashion a remedy for the collection of Spill Act taxes during the pre-emption period that least offends the congressional purpose in repealing pre-emption," App., 37a.[19/]

However, this Court recognized when it rendered decision in *Hunt* that Section 114(c) had already expired and that reauthorization legislation was under consideration in Congress, but it concluded that these developments were irrelevant to the State's duty to reimburse petitioners for pre-empted state action during the period in which Section 114(c) was in effect:

> Of course, [petitioners'] claims for a refund of taxes paid through September 30, 1985, are unaffected by the expiration of CERCLA *or by any changes in the law after that date*.

[19/] The New Jersey Supreme Court's determination of the "congressional purpose in repealing pre-emption" was based solely upon the legislative history of the 1986 amendments to CERCLA, including the carefully scripted remarks of Senator Lautenberg of New Jersey. App., 36a. *Compare Conroy* v. *Aniskoff*, 113 S. Ct. 1562, 1567 (1993) (Scalia, J., concurring).

475 U.S. at 362 n.6 (emphasis added); *see generally Greene* v. *United States*, 376 U.S. 149, 160 (1964). The state court ignored this unambiguous directive by relying on the asserted policies that underlay SARA to limit the relief to which petitioners were entitled under CERCLA.

Furthermore, the exercise of *any* equitable discretion by the New Jersey courts in this case is incompatible with this Court's unanimous decision in *McKesson* v. *Division of Alcoholic Beverages & Tobacco*, 496 U.S. 18 (1990). In *McKesson*, Florida's liquor excise tax provided preferential treatment for in-state parties. While holding that this tax violated the Commerce Clause and enjoining future exactions under the tax, the Florida Supreme Court invoked its equitable discretion in refusing to order "a refund of the differences between the disfavored product's tax rate and the favored product's tax rate." *Id.* at 26.

This Court reversed, holding that the Due Process Clause of the Fourteenth Amendment "obligates the State to provide meaningful backward-looking relief to rectify any unconstitutional deprivation." *Id.* at 31. For taxes declared invalid — like those here — because they are "beyond the State's power to impose" or because the taxpayer is "absolutely immune from the tax," the State has "no choice but to 'undo' the unlawful deprivation by refunding the tax previously paid under duress." *Id.* at 39.[20/]

[20/] The crucial passage in *McKesson* reads as follows:

> Had the Florida courts declared the Liquor Tax invalid either because (other than its discriminatory nature) it was beyond the State's power to impose, as was the unapportioned tax in *O'Connor*, or because the taxpayers were absolutely immune from the tax, as were the Indian Tribes in *Ward* and *Carpenter*, no corrective action by the State could cure the invalidity of the tax during the contested tax period. The State would have had no choice but to "undo"

(continued...)

In contrast, "a State found to have imposed an *impermissibly discriminatory tax* retains flexibility" in remedying the violation. *Id.* at 39-40 (emphasis added). It is only in this latter circumstance that the State retains discretion to remedy the discriminatory element of the tax through either (a) a refund of the portion of the imposed tax that exceeded the tax on in-state products, (b) imposition of a retroactive tax on the preferred products, or (c) an appropriate combination of (a) and (b). *Id.* at 40-41. *See also Harper* v. *Virginia Department of Taxation*, 113 S. Ct. 2510, 125 L. Ed. 2d 74 (1993) (same).[21/]

The New Jersey Supreme Court's exercise of its "equitable powers" to deny petitioners a refund in this case,

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[20/](...continued)

> the unlawful deprivation by refunding the tax previously paid under duress, because allowing the State to 'collect these unlawful taxes by coercive means and not incur any obligation to pay them back . . . would be in contravention of the Fourteenth Amendment.'

496 U.S. at 39 (citations omitted).

[21/] *McKesson* and *Harper* provide further evidence that the New Jersey courts departed from the mandate in *Hunt* by exercising equitable discretion to deny petitioners a remedy. In *McKesson* and *Harper*, both of which involved impermissibly discriminatory taxes for which a flexible remedy was appropriate, this Court expressly stated in the remand instructions that the state court was "free to choose which form of relief it will provide." *McKesson*, 496 U.S. at 51-52; *Harper*, 113 S. Ct. at __, 125 L. Ed. 2d at 89. By contrast, in *Hunt*, which involved a tax "beyond the power of the State to impose," the Court made no reference to the state court's discretion to choose the form of remedy. *See Hunt*, 475 U.S. at 383 (Stevens, J., dissenting) ("the Court should advise the New Jersey courts how they should calculate the partial refund of taxes to which appellants are presumably entitled on remand").

which deals with a tax "beyond the State's power to impose," is inconsistent with *McKesson*.[22/]

CONCLUSION

For the reasons stated above, the petitioners respectfully request that this Court issue a writ of certiorari to reverse the New Jersey courts' clear misapplications of *Hunt* and *McKesson* in denying petitioners a refund of all of the Spill Act taxes which they paid while Section 114(c) was in effect. Summary action would be appropriate in this case, for the pertinent law is ". . . well settled and stable, the facts are not in dispute, and the decision below is clearly in error."

[22/] Even on the New Jersey courts' erroneous premise that *Hunt* held that Section 114(c) invalidates only expenditures from the Fund for an improper purpose, the tax assessed against petitioners to support these expenditures, which totalled more than $8 million, was "beyond the power of the State to impose." Thus, under *McKesson*, the New Jersey courts had no discretion to deny petitioners a refund of their share of the taxes collected for moneys expended for an improper purpose.

Mireles v. Waco, 112 S. Ct. 286, 290 (1991) (Scalia, J., dissenting) (quoting *Schweiker* v. *Hansen*, 450 U.S. 785, 791 (1981) (Marshall, J., dissenting)).

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